Supreme Court, U. S.
FILED
JUL 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

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NO. 77-1161

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Richard Russell,
Petitioner

vs.

The State of Texas,
Respondent

* * * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

* * * * * * * * * * *

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To The Honorable Supreme Court of
The United States:

Richard Russell prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas filed on November 10, 1976, the order overruling the First Motion for Rehearing entered on April 6, 1977, and the order overruling the Second Motion for Rehearing entered on May 25, 1977.

OPINION BELOW

The Opinion of the Court of Criminal Appeals on Petitioner's First Motion for Rehearing is included herewith in Appendix A. This Opinion will be reported at____S.W.2d____ (Tex.Cr.App.1977) The Opinion on original submission is not germane to the issues submitted herein, but is included in Appendix C. The Court did not file an opinion in connection with the overruling of Petitioner's Second Motion for Rehearing.

JURISDICTION

The judgment of the Court of Criminal Appeals was filed on November 10, 1976. Petitioner's First Motion for Rehearing was overruled on A pril 6, 1977. Petitioner's Second Motion for Rehearing was overruled on May 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Did the Court of Criminal Appeals err in apparently holding that a prior acquittal for an offense is not a bar to a probation revocation

proceeding, when the sole basis of the revocation proceeding is the commission of the offense of which the accused has been acquitted?

LOCAL COURT RULES INVOLVED

Rules of the Court of Criminal Appeals:

Rule 9. Motions for rehearing and leave to file, written argument; setting case for resubmission.

> Motions for rehearing may not be filed as a matter of right. Any party desiring a rehearing of any matter determined by the Court must, within fifteen days after the opinion is handed down, present to the Clerk a motion for rehearing, distinctly specifying the grounds relied on for a rehearing, accompanied with a motion for a leave to file, and such written argument in behalf of the motion as may be desired; and nine copies of all such papers shall be presented to the Clerk for distribution to the Judges and Commissioners of the Court. The party presenting the motion for leave to file shall certify that copies of the motion for leave to file, motion for a rehearing and argument, if any, have theretofore been delivered to the opposite party. The motion for leave to file shall be filed by the Clerk, and together with the motion for rehearing and written argument, if any, will be submitted for action

> of the Court. The Court may request the opposite party to submit a reply, and in that event the Clerk will so advise such party. If the Court concludes for any reason that a reply should not be requested, it will act upon the motion without giving prior notice to the opposite party. If as many as two members of the Court are of the tentative opinion that the motion for a rehearing should be granted in whole or in part, the motion for leave to file will be granted, the motion for rehearing will be filed, and the case will be placed upon the docket and will be thereafter set for a resubmission to the Court. Otherwise, the motion for leave to file will be overruled, and the motion for rehearing will not be filed. If the motion for a leave to file is granted, the Clerk will give notice to all counsel of record of the filing of the motion for rehearing by mail, or give such other notice as may be ordered by the Court. Any motion for rehearing may be amended, with leave of the Court, any time before its final disposition. When a case is set for resubmission on motion for rehearing, the Clerk will give notice to all counsel of record notice of such setting. However, when a case is set for resubmission on motion for rehearing, oral argument will be allowed only upon invitation from the Court upon the grounds specified by the Court, and ordinarily anyone so invited to present oral argument

will be limited to fifteen minutes, with it being understood that the Court may, in its discretion, limit or extend the time for such oral argument.

Rule 10. Opinion on motion for rehearing, rehearing by losing party.

If the Court hands down an opinion in connection with the determination of a motion for rehearing, the losing party, within fifteen days after such opinion is handed down, may seek a further rehearing by availing himself of and following the rules and procedures set forth in Rule 9 above with respect to motions for rehearing; but further motions for leave to file and further motions for rehearing shall not be filed or considered in any other event.

PROCEEDINGS IN THE COURTS OF TEXAS

Petitioner was indicted in Cause No. F75-12165-MP in the District Court of Dallas County, Texas for the alleged offense of felony theft under the laws of the State of Texas. (App. 1g) The State also filed a Motion to Revoke Petitioner's Probation alleging as the sole ground therefor the commission of the same offense alleged in the Indictment. (App. 1 b)

Petitioner interposed pleas of "not guilty" and "not true" to the Indictment and Motion to Revoke Probation respectively, and the District Court proceeded to trial simultaneously on both the Indictment and the Motion on January 15, 1976.

On January 15, 1976, the District Court acquitted the Defendant of the offense alleged in the Indictment, stating in the record:

"The Court: 'There being nothing further the Court finds that the State has not proven the Indictment

in Cause F75-12165-MP by the legal and competent evidence beyond a reasonable doubt and finds the Defendant to be not guilty in that case.'" (App. 1 d)

The Court deferred action on the Motion to Revoke Probation and on January 28, 1976, the Court reconvened, made additional fact findings, and revoked Petitioner's probation, finding as its reason therefor that Petitioner had committed the same offense of which he had been acquitted thirteen days previously. (App.1e, 1-5f)

The Trial Court's order revoking Petitioner's probation was affirmed by the Court of Criminal Appeals of Texas on November 10, 1976.

On November 29, 1976, Petitioner filed a Motion For Leave of Court to File a Motion for Rehearing, together with a Motion for Rehearing, raising the constitutional issues which Petitioner is submitting to this Court in his Petition for a Writ of Certiorari.

On December 15, 1976, the Court of Criminal Appeals granted Petitioner's Motion for Leave to File Motion for Rehearing, thus indicating that at

least two of the five judges of that Court were then of the view that Petitioner's Motion for Rehearing was meritorious. (App. 1-3h)

On April 6, 1977, the Court overruled Petitioner's Motion for Rehearing, holding inter alia, per Judge Douglas:

"...This is a revocation proceeding and as such is not a criminal prosecution...
...Acquittal in a criminal proceeding merely determines that guilt was not proved beyond a reasonable doubt while in a revocation proceeding proof need not be beyond a reasonable doubt but only by a preponderance of the evidence...
...Thus, in criminal cases in which an individual has once been hailed before a jury or a judge and found innocent, res judicata, including collateral estoppel rests upon the double jeopardy clause of the Fifth Amendment and prevents a second prosecution for the same conduct or subject matter. Obviously that is not the situation in a revocation proceeding. It is not a 'prosecution.'"

(emphasis supplied)
(App.12a,13a)

Petitioner thus filed his Motion For Leave of Court to File a Second Motion for Rehearing, which again

raised the issues which Petitioner submits to this Court in his Petition for a Writ of Certiorari. The Court of Criminal Appeals then granted Petitioner's Motion For Leave of Court to File a Second Motion for Rehearing, again indicating that at least two fo the five judges of that Court felt that Petitioner's Second Motion for Rehearing was meritorious.

On May 25, 1977, the Court overruled Petitioner's Second Motion for Rehearing without written opinion. (App. 1 i)

On May 27, 1977, the Court of Criminal Appeals stayed the issuance of its mandate for a period of thirty days. One June 27, 1977, the Court of Criminal Appeals denied Petitioner's Second Motion to Stay Mandate, and the mandate of that. Court has been issued.

Petitioner is presently at liberty on bond, and his re-sentencing is set for July 22, 1977 in the District Court of Dallas County, Texas.

PRELIMINARY STATEMENT

This case presents a classic example of double jeopardy, res judicata and collateral estoppel within the contemplation of the Fifth Amendment to the Constitution of the United States. Petitioner was the subject of both an Indictment and a Motion to Revoke Probation based on a single offense: theft. The Indictment and Motion to Revoke Probation were tried simultaneously. The Trial Court found Petitioner "Not Guilty" of the offense charged in the Indictment, took the Motion to Revoke Probation under advisement and thirteen days later revoked Petitioner's probation, finding that Petitioner had committed the same offense of which he had been previously acquitted.

Thus, the record discloses an unconditional verdict and judgment of acquittal followed by an additional fact finding process which results in the imprisonment of the Petitioner for the same offense.

REASONS FOR GRANTING THE WRIT

I

The Court of Criminal Appeals Has Decided a Federal Question of Substance in a Way Probably Not in Accordance with Applicable Decisions of this Court.

II

The Court of Criminal Appeals Has Decided a Federal Question of Substance Not Heretofore Precisely Determined by this Court.

III

The Court of Criminal Appeals Has Decided a Federal Question of Substance in a Manner Contrary to the Fifth Amendment to the Constitution of the United States.

It is well established under federal constitutional principles that the termination of a prosecution in favor of the accused is a bar to further

proceedings under the principles of Double Jeopardy and collateral estoppel. Thus if a Court of competent jurisdiction proceeds to trial on the merits upon a valid indictment and enters a judgment of acquittal thereupon, the acquittal is clearly a bar to further proceedings based upon the same facts. United States vs. Jenkins, (1975) 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed. 250; Galloway vs. Beto, 421 F.2d 284 (5th Cir. 1970), United States vs. Kehoe, 516 F.2d 78 (5 Cir. 1975).

The recent case of United States vs. Jenkins, supra, contains a thorough review of the authorities and the applicable principles. Jenkins concerned the right of the government to appeal an action of a U.S. District Court "dismissing" an indictment and "discharging" the accused at the close of the government's presentation of it's case in chief. The accused took the position that the appeal should be dismissed because the appeal itself contemplated further proceedings subsequent to the termination of the prosecution in

favor of the accused in violation of the Double Jeopardy Clause. The government replied that the appeal was taken from the legal decision of the District Court rather than from a factual acquittal on the merits, and thus not constitutionally impermissible.

The Supreme Court held that although the action of the District Court was couched in terms of "dismissal" of the indictment the Supreme Court could not hold as a matter of law that the adjudication did not contain some element of the resolution of some factual controversy in favor of the accused. The Supreme Court thus dismissed the appeal, holding inter alia:

> "But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. §3731 that further proceedings of some sort devoted to the resolution of factual issues going to the elements of the offense charged would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make additional findings. The trial which could have resulted in a judgment of conviction has long since terminated in respondent's favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause." [Emphasis supplied]

Thus an appeal from an ambiguous order which could result in a remand for additional fact findings constitutes a violation of the Federal Double Jeopardy Clause.

The case at bar is a far clearer and more compelling case of Double Jeopardy than that viewed by the Supreme Court in Jenkins, supra. First, we are not confronted at the threshold with the often presented problem of whether the lower court action was a dismissal of the indictment or an acquittal. The Record discloses:

> "The Court: There being nothing further, the Court finds that the State has not proven the indictment in Cause F-75-12165 by the legal and competent evidence beyond a reasonable doubt, and finds the Defendant to be not guilty in that case." (Appendix 1 d).

Thus we have a clear, unqualified, and unequivocal acquittal on the merits. The prosecution has terminated in favor of the accused.

The record further reflects that this verdict and judgment of the Court was pronounced on January 15, 1976, and determination of the merits of the Motion to Revoke was deferred until January 28, 1976, whereupon the Court made additional fact findings and revoked Appellant's probation. (Appendix 1e, 1-5f)

Thus we have a clear case where the Court has proceeded to judgment of acquittal and the prosecution has thus terminated in favor of the accused. The Trial Court then on a subsequent date enters additional fact findings based on the same record, finds that the accused has committed the offense and sentences him to the penitentiary. This is a classic textbook case of the sort of procedure which the Supreme Court held unconstitutional in United States vs. Jenkins, supra.

The State is not aided by the fact the subsequent sentence was in connection with the Motion to Revoke, Probation rather than the indictment. The sole ground alleged in the Motion to Revoke was the offense alleged in the indictment (Appendix 1g, 1b) The question of the guilt or innocence of the accused of that offense was litigated by the Court in the prior proceeding, and the Court proceeded to an unqualified, unconditional verdict and judgment of acquittal.

The Court can not find the accused not guilty of an offense, then subsequently find that he committed that same offense and sentence him to prison, regardless of the procedural terminology employed.

Nor may the State find refuge in the often noted distinction in the requisite burden of proof between proceedings on indictments and revocation proceedings, that is "beyond a reasonable doubt" versus "by a preponderance of the evidence." The State can not avoid the effect of the holding in United States vs. Jenkins, supra, by contending that the Court's failure to find the accused guilty "beyond a reasonable doubt" does not preclude its later finding of guilt "by a preponderance of the evidence." It must be remembered this Court in Jenkins was dealing with an ambiguous order and it could not presume on appeal that the Trial Court did not resolve some factual controversy in favor of the accused. Here we are dealing with a judgment of acquittal, and this Court can not presume on appeal that such judgment did not resolve some factual controversy in favor of the accused.

Petitioner respectfully urges that the Court of Criminal Appeals of Texas has erred in its disposition of his constitutional jeopardy issue. The fundamental problem is illustrated by that Court's analysis contained in it's Opinion on Motion for Rehearing. The Court has indicated that "acquittal in a criminal proceeding merely determines that guilt was not proved beyond a reasonable doubt . . ." [Emphasis supplied]. The Court goes on to state "thus, in criminal cases in which an individual is once hailed before a jury or a judge and found innocent, res judicata, including collateral estoppel, rests upon the double jeopardy clause of the Fifth Amendment and prevents a second prosecution for the same conduct or subject matter." Thus it would appear under the Court's analysis that if a Defendant obtains a "mere acquittal" he is in a different situation with respect to jeopardy than if he is found "innocent." The problem is that our jurisprudence has no procedure for finding an accused person "innocent." The innocence of such a person

is presumed, and guilt only attaches upon the defendant's conviction upon proper proof. Thus in effect an acquittal in a criminal prosecution results from the State's failure to overcome the presumption of innocence, thus a "mere acquittal" leaves the defendant with the presumption of innocence with which he entered the proceeding. Prior to the proceedings in question, Petitioner was entitled under the law to the presumption of innocence. He must have been presumed to be innocent of the offense of theft of the property of Otis Dunlap. On January 15, 1976 the Court found the defendant not guilty of that offense in clear, unequivocal, and unmistakable terms. The Court pronounced as follows: "There being nothing further, the Court finds that the State has not proven the indictment in Cause No. F-75-12165, by the legal and competent evidence beyond a reasonable doubt, and finds the defendant to be not guilty in that case." (Appendix 1 d). It is important to note that the Court did not further elaborate upon the reasons for its

decision, but simply pronounced the defendant not guilty. At this point the State has failed to overcome the presumption of innocence and the principals of jeopardy, res judicata, and collateral estoppel prohibit his being subjected to further criminal proceedings arising out of the offense alleged in the indictment, to-wit the theft of money from Otis Dunlap.

The record further reflects that the Court convened again on January 28, 1976, whereupon the Court made certain fact findings and revoked Appellant's probation (Appendix 1f). Thus we have a situation where Appellant is ndicted for the offense of theft of money from Otis Dunlap, is found not guilty of theft of money from Otis Dunlap on January 15, 1976, and subsequently is sentenced to the penitentiary for theft of money from Otis Dunlap on January 28, 1976.

This Court's opinion asserts that "The Record reveals that in fact the Judgment was entered because the State failed to prove proper venue. (Appendix 14a). It

is respectfully suggested that the Court of Criminal Appeals is in error in this assertion inasmuch as the Record does not bear this out. The Trial Court simply found the Defendant not guilty and did not further elaborate upon its reasons (Appendix 1 d).

This Court cannot presume from this record that the verdict of the Court pronounced on January 15, 1976 did not resolve other factual controversies in favor of the Defendant. United States vs. Jenkins, supra. The criminal prosecution arising out of the Dunlap transaction terminated in favor of the accused on January 15, 1976. The Court found the Defendant not guilty without stating specific reasons. There are numerous factual controversies that could have been involved in the Court's determination at that point. For example, the Court may not have believed the State's witnesses, or the Court may have believed that the Defendant lacked the necessary sulpable mental state. In any event, the prosecution was finally terminated and whatever factual controversies existed were resolved in favor of the Defendant.

This Court cannot presume the opposite of that on appeal.

The action of the Court on January 28, 1976 wherein the Court made certain fact findings and revoked Appellant's probation is clearly a further proceeding subsequent to the prior acquittal. There is no question but that the indictment and the revocation proceedings were based upon the same transaction, the alleged theft of Otis Dunlap. There is no question but that Appellant had been previously found not guilty of that offense.

This Court's opinion avoids the inevitable conclusion that jeopardy has attached by holding that the subsequent proceeding was not a "prosecution". (Appendix 13a). It is respectfully suggested that in this context the distinction is more semantical than substantive. Clearly a revocation proceeding has many attributes of a criminal proceeding: (a) It is brought by the State acting by her Criminal District Attorney (b) the action was commenced in a legislatively constituted Criminal District Court (c) the proceeding is appealable to the Court of

Criminal Appeals (d) the end result for Appellant appears to be confinement in prison.

Clearly important Federal and State Constitutional safeguards cannot be made to depend upon whether a criminal action is termed a "prosecution" or is designated as some other type of criminal proceeding. Mempa vs. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 LED. 2d 336.

At bottom any distinction between a criminal trial and the revocation process in the context of this case must rest on the burden of proof issue - reasonable doubt versus a preponderance of the evidence. The State could argue that the Trial Judge in this case was not convinced beyond a reasonable doubt but was convinced by a preponderance of the evidence. This argument is without merit because of the particular context and procedural time sequence of this particular case. First, the Trial Court pronounced the Defendant "Not Guilty" without stating specific reasons, other than that the State did not prove the indictment beyond a reasonable doubt. The Court did not elaborate upon

which elements of the indictment had not been proved to it's satisfaction. Second, the Trial Court took the Revocation matter under advisement, and recommended on a subsequent date and entered it's fact findings and revoked Appellant's probation. Thus we have a further criminal fact finding process subsequent to the termination of the prosecution in favor of the accused which is condemned by this Court in Jenkins, supra.

Under the holding of the Court of Criminal Appeals of Texas in this case it will now be possible for Defendants to be acquitted by juries in state criminal trials, only to have their probation revoked subsequently by Trial Judges based upon the very same alleged offense of which they have been acquitted. It is difficult to imagine this Court countenancing such a procedure, but that is the inevitable result of the Texas Court's ruling herein.

United States vs. Martin Linen Supply Company, ____US____51 LED 2d 642, 97 S.Ct.1349 (April 4, 1977):

> "Society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate it's very vital interest in enforcement of criminal laws."

CONCLUSION

Because the decision of the Court of Criminal Appeals of Texas raises serious questions under the Fifth Amendment and because the resolution of the questions is vital to the proper administration of probation revocation proceedings in the State courts:

We respectfully submit that the Court should grant Petitioner's prayer for a Writ of Certiorari.

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APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF CRIMINAL APPEALS OF TEXAS

APPENDIX A

RICHARD RUSSELL Appellant No. 53,201	I	Appeal from
VS.	I	Dallas
THE STATE OF TEXAS Appellee	I	County

OPINION ON APPELLANT'S MOTION FOR REHEARING

On original submission we affirmed in a per curiam opinion the order revoking appellant's probation, overruling his sole contention that he was denied effective assistance of counsel when he was originally convicted and placed on probation.

On rehearing he contends that the evidence was insufficient at the revocation hearing to show that he violated the condition of probation to commit no offense against the laws of this State. He also contends that because he was found not guilty under an indictment his probation could not be revoked upon the same transaction. We overrule both contentions.

Only the facts at the revocation hearing are before us. Russell was

indicted by a Dallas County grand jury for the offense of theft during its July, 1975 term in Cause No. F75-12165-MP and subsequently a motion to revoke probation was filed on October 30, 1975. By agreement, the motion to revoke probation was heard simultaneously with Cause No. F75-12165-MP because both were based upon the same transaction. Trial was before the court upon a plea of not guilty in Cause No. F75-12165-MP.

On September 20, 1975, Otis Dunlap purchased certain real property located on Lake Tawokani in Van Zandt County delivering to appellant his personal check in the amount of $250.00 representing one-half of the required down payment upon signing of a contract of sale. Two days following the signing of the contract Dunlap made a check of the tax rolls of Van Zandt County and discovered that appellant was not the owner of the property in question and a complaint was filed when he could not locate Russell.

Dunlap testified that on September 20, 1975, in response to an ad in the Dallas Morning News, he made an appointment to see the lots advertised for sale by appellant on Lake Tawokani. Dunlap, his wife and daughter met appellant at Terra-Mar Estates on Lake Tawokani on the same day. Initially Russell showed the Dunlaps lots priced from $4,000.00 to $6,000.00 Dunlap asked, "Is this the land that was advertised?" and Russell said, "No." Dunlap's wife then insisted that he show them the lots advertised for $1500.00. Russell took them to another section and they were shown three lots priced at $6,000.00, $5,000.00, and $2,000.00, respectively. Dunlap stated that he and his wife decided on the $2,000.00 lot and prior to entering in to the contract of sale asked appellant if he owned the property he was attempting to sell. "He said he owned it." However, Russell made no mention of any liens, security interest, adverse claims or any other legal impediment to his enjoyment of the property.

Russell requested $500.00 as down payment and the balance in installments bearing interest at the rate of ten (10%) percent per annum. Dunlap refused to pay the full $500.00 but agreed to pay $250.00 and another $250.00 within ten days. He further testified that if in fact Russell had made disclosure to him that he did not own the land he would not have entered into the contract nor given him the $250.00. On Monday, September 22, Dunlap's bank called him to verify the amount of the check because an apparent inconsistency existed between the numerical figure and the written amount. He then tried to call Russell at the number he had called on Saturday, 270-8102, and found that it had been disconnected. He then tried to call the "...Richard Russell listed of Sulphur Springs, Oklahoma," to no avail. He then went to Canton to check the Van Zandt County tax rolls and discovered that the property was owned by Margaret Funderburk Estates. Dunlap did not pay the second $250.00.

George Funderburk testified that the property in question belonged to him and his sister. He stated that the property had been listed with Kennedy Realtors of Longview. Funderburk further testified that a contract of sale on the acreage of Terra-Mar Estates had been entered into between him and Richard Russell on May 23, 1975, and that at the time of the signing of the contract $1,000.00 was placed in escrow by Russell. Part of the agreement was that Russell would find a surveyor and Funderburk would pay for the cost of surveying the outside perimeter. Gwen Huddleston surveyed the tract, both the outside perimeter and internal tracts of approximate acre. The cost of the internal survey was to be borne by Russell. Funderburk paid Huddleston's entire bill of $940.00 just a few days before the trial. He stated that the closing on the Russell contract never did take place.

Next, George E. Kennedy, Jr., of Kennedy Real Estate, testified that Russell had entered into a contract with Funderburk for the purchase of

the approximately 140-150 acres on Lake Tawokani and that Russell had deposited with him $1,000.00 of the $20,000.00 down payment, the balance due within ninety days of closing. He said that a closing date was never set because they had not received the remaining $19,000.00, even though the contract provided for payment "...on or before 90 days from the date of closing." However, the survey and title opinion also had to be completed before a closing date could be set. He also recalled discussing the survey with Russell and it was agreed that Russell could select a surveyor to lay out his plats and also do the outside perimeter with Funderburk paying for the cost of the outside perimeter. On July 1, 1975, he stated that he and D.W. Campbell of his office had had a discussion with Russell concerning the requirement for him to disclose liens, adverse claims, and interest held by other parties. They had had several calls of inquiry from different people and as a result thereof had

informed Russell that he should disclose to people that he had a contract and did not actually own the land, "...but would receive the land as soon as he paid X number of dollars for a release." While this had not been past policy it was a requirement learned from attendance at a seminar conducted by Housing and Urban Development.

Campbell testified that following inquiry by a man named Gil Buck of Dallas, he and Kennedy went out to Terra-Mar Estates and told Russell that "...he should give a full disclosure to all of these people he was dealing with on what he was doing, and he informed us he had a way of doing business and he would do business his way, and we could do business our way." Russell was informed that he could not sell the lots because they had not been surveyed at that point. Following that visit, Russell called their office and asked that if inquiries were made that they should say that he owned the property and Russell was informed that they would not do so because he did not own

the property.

The defense did not present any witnesses and the court found the appellant not guilty in Cause No. F75-12165-MP, apparently for the failure of the State to prove venue. However, the court found the evidence sufficient to show that the offense of theft had been committed in Van Zandt County and entered an order revoking his probation. The court noted that appellant apparently through his family had made restitution of over five thousand dollars before reducing punishment from five to three years.

It is true that appellant had entered into a contract for the purchase of Terra-Mar Estates. The situation in the instant case differs from that found in Bearden v. State, 487 S.W.2d 739 (Tex. Cr.App. 1972), because appellant was not required to deliver a deed to Dunlap at the time of the signing of the contract of sale between them. His contract with Dunlap required him to deliver the deed clear of encumbrances when Dunlap had paid in full

the purchase price of the property. There is no showing in this record that Russell would not have been able to perform, thereby distinguishing his situation from Bearden where Bearden had a duty to deliver a deed and was unable to do so. Further, Russell could properly call himself an owner. "The meaning of the term 'owner' is varied and depends in a great measure on the manner of its use. In common speech it is most often used to designate the person in whom the legal or equitable title rests, as distinguished from a mere occupant or tenant. When used alone it imports an absolute owner or one who has complete dominion of the property owned, as the owner in fee of real property. It is often used to characterize the possessor of an interest less than that of absolute ownership." 63 Am.Jur. 2d, Property, Section 32. It appears that Russell did have an equitable interest in the property.

Appellant's act of deception did not lie in his claiming to be the owner, but in his failure to make disclosure of existing liens, security interest,

and other adverse claims which might serve as a detriment to a buyer's enjoyment of the property. V.T.C.A., Penal Code, Section 31.03, provides in appropriate part:

> "(a) A person commits an offense if, with intent to deprive the owner of property:
>
> > "(1) he obtains the property unlawfully; . . .
>
> "(b) Obtaining or exercising control over property is unlawful if:
>
> > "(1) the actor obtains or exercises control over the property without the owner's effective consent; . . ."

V.T.C.A., Penal Code, Section 31.01, provides that consent is not effective if induced by deception. In that same section, "deception" is defined in Section 31.01 (2) (D), as follows:

> "(D) selling or otherwise transferring or encumbering property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid, or is or is not a matter of official record; or . . ."

The gravamen of appellant's offense is his failure to disclose existing

liens and security interest in the property he was attempting to sell. The explanatory comment following Section 31.03 in 2 Branch's 3d Ed. reads as follows:

> "Consent is not effective if induced by deception. 'Deception' is defined in Section 31.03 (2). As in present law, the victim's consent must result from his reliance on the deception, i.e., he would not have consented had he known the truth. It is not theft if the victim knows the truth and knows the actor is lying but nonetheless agrees to the transaction. Applying the culpable mental states to this concept, the deception must be intentional and for the purpose of inducing consent.
>
> Conduct which falls within the definition of 'deception' requires, with one exception, that the actor take some affirmative action that is 'likely to affect the judgment of another.' The one exception is in subsection (b) of Section 31.01 (2) which requires the disclosure of liens, security interest, adverse claims, and other legal impediments to enjoyment before transferring or encumbering property, whether or not valid and whether or not same is a matter of official record. To this extent this is a change from present law."

Appellant's contention is overruled.

He also contends that the trial

court's judgment of not guilty in Cause No. F75-12165-MP was a bar to the entry of a subsequent order revoking probation on the basis of the same alleged offense. His contention is without merit.

This is a revocation proceeding and as such is not a criminal prosecution. Barrow v. State, 505 S.W.2d 808 (Tex. Cr. App. 1974). The proceeding itself takes the form of a trial, with the presence of witnesses, and the introduction of evidence. Morrissey v. Brewer, 408 U.S. 475, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972), and Ex parte Shivers, 501 S.W.2d 898 (Tex.Cr. App. 1973). The principal difference in a criminal prosecution and a revocation hearing is the degree of proof required. Acquittal in a criminal proceeding merely determines that guilt was not proved beyond a reasonable doubt while in a revocation proceeding proof need not be beyond a reasonable doubt but only by a preponderance of the evidence. Kelly v. State, 483 S.W.2d 467 (Tex. Cr. App. 1972). See Scamardo v. State, 517 S.W.2d 293 (Tex.Cr.App. 1974).

There are also other differences such as the uncorroborated testimony of an accomplice will not support a conviction standing alone in a criminal prosecution while a revocation of probation may be based on such testimony. Moreno v. State, 476 S.W.2d 684 (Tex. Cr. App. 1972).

The federal constitution as well as the Texas Constitution prohibit placing an accused twice "in jeopardy" for the same offense. Thus, in criminal cases in which an individual has once been hailed before a jury or a judge and found innocent, res judicata, including collateral estoppel, rests upon the double jeopardy clause of the Fifth Amendment and prevents a second prosecution for the same conduct or subject matter. Obviously that is not the situation in a revocation proceeding. It is not a "prosecution." Appellant's conduct is being considered in view of the conditions imposed upon him under the terms of his probation. A finding that he has not abided by those conditions results only in his commencement of an imprisonment term for an

offense for which he was previously convicted. Revocation of probation does not place a defendant in jeopardy twice for the same crime. Valdez v. State, 508 S.W. 2d 842 (Tex.Cr.App. 1973). Nor does there need to be a trial and a valid conviction for the offense which serves as the basis for the revocation. Vance v. State, 485 S.W.2d 580 (Tex.Cr.App. 1972).

The Judgment of not guilty in Cause No. F75-12165-MP was resultant from the trial court's finding that the State had not proved the indictment in that cause beyond a reasonable doubt. The record reveals that in fact the judgment was entered because the State failed to prove proper venue. The record reflects that the motion to revoke was amended to reflect that the alleged offense had occurred in Van Zandt County instead of Dallas County and no objection was made. An order revoking probation was entered.

We hold that appellant's acquittal in Cause No. F75-12165-MP did not act as a bar to using the same offense as a basis for revoking probation. Appellant has not been twice placed in

jeopardy for the same offense.

No abuse of discretion having been shown, the motion for rehearing is overruled and the judgment is affirmed.

Douglas, Judge

(Delivered April 6, 1977)

APPENDIX B

THE STATE OF TEXAS — 203rd JUDICIAL DISTRICT COURT

VS.

RICHARD RUSSELL — DALLAS COUNTY, TEXAS

JULY TERM, 1975

MOTION TO REVOKE PROBATION

Comes now the State of Texas by and through her Criminal District Attorney and would show the Court the following:

That Richard Russell, Defendant was duly and legally convicted in the above entitled and numbered cause in 203rd Judicial District Court of Dallas County, Texas, on the 19th day of February, A.D. 1975 of the offense of detaining goods with intent to defraud by giving and drawing a check over the value of fifty

dollars on a bank without sufficient funds, as charged in the indictment, and placed on probation for a period of 5 years.

That Defendant has violated the following conditions (a) of said probation in that:

(a) Commit no offense against the laws of this or any other state of the United States; (on or about the 27th day of September, 1975, in Dallas County, Texas, RICHARD RUSSELL did unlawfully, knowingly, and intentionally appropriate current monies of the United States of America of the value of at least $200.00 and not more than $10,000.00 without the effective consent of the owner Otis M. Dunlap, and with the intent to deprive the said owner of said property.

This violation-offense occurred after February 19, 1975 and during the term of probation.

Wherefore, the State prays that said Defendant be cited to appear before this Honorable Court and show cause why his probation should not be revoked;

and that upon a final hearing, the probation heretofore granted said Defendant be revoked.

This the 30th day of October, A.D. 1975.

Henry Wade
District Attorney
Dallas County, Texas

APPENDIX C

RICHARD RUSSELL — Appeal from
NO. 53,201 v. — Dallas County
THE STATE OF TEXAS

O P I N I O N

Appeal is taken from an order revoking probation. A plea of guilty was entered by the appellant to the offense of defrauding with a worthless check over the value of fifty dollars on February 19, 1975. The indictment alleged that the offense occurred on or about August 27, 1973, and prosecution was pursuant to Art. 567b, V.A.P.C. Punishment was assessed at five years probated.

The State filed a motion to revoke probation on October 30, 1975, alleging that appellant ahd violated the condition of probation which required that he "commit no offense against the laws of this or any other state or the United States" in that "On or about the 27th day of September, 1975, in Dallas County, Texas Richard Russell did unlawfully, knowingly, and intentionally appropriate current monies of the United States of America of the value of at least $200 and not more than $10,000. without the effective consent of the owner Otis M. Dunlap, and with the intent to deprive the said owner of said property." The record reflects that the court granted the State's motion to amend so as to reflect that the offense made the basis of the motion to revoke occurred in Van Zandt County.

After the conclusion of the hearing on the motion, the court entered an order revoking appellant's probation finding that appellant had violated

"...Condition (a) to wit: commit no offense against the laws of this or any other state or the United States." Punishment was reduced by the court to three years.

Appellant's sole contention is, "the conviction upon which the probation was based was void because the appellant was denied his Sixth Amendment right to effective assistance of counsel."

While the general rule is that failure to appeal when placed on probation waives the right to appeal,[1] the question of whether appellant was denied his right to effective assistance of counsel under the Sixth Amendment is a matter that may be raised by collateral attack, and we hold that such question may be raised upon appeal from the order revoking probation. "To require a separate habeas corpus proceeding to attack such a conviction would be to require a useless thing." Ramirez v. State, 486 S.W. 2d 373; see also Martinez v. State, 494 S.W.2d 545.

Appellant reasons that since the

1. Hungerford v. State, 474 S.W.2d 242; Patterson v. State, 487 S.W. 2d 737.

offense occurred before the effective date of the new Penal Code, and trial was after such date, the applicable punishment would have been for a Class C misdemeanor had appellant's counsel made an election to be punished under the new Penal Code.

The Savings Provision of the new Texas Penal Code, Acts 1973, 63rd Leg.. Ch. 399, Sec. 6, provides in pertinent part:

"(a) ...this Act applies only to offenses committed on or after its effective date, and a criminal action for an offense committed before this Act's effective date is governed by the law existing before the effective date, which law is continued in effect for this purpose, as if this Act were not in force....

****

(c) In a criminal action pending on or after the effective date of this Act, for an offense committed before the effective date, the defendant, if adjudged guilty, shall be assessed punishment under this Act if he so elects by written motion filed with the trial court before the sentencing hearing begins."

The indictment to which appellant entered a plea of guilty in the primary offense alleged that appellant "... with intent to defraud make ... a certain check, draft and order for the payment of $1365.15 in money..."

Appellant urges that had an election been made, punishment would have been for "Issuance of Bad Check" under V.T.C.A. Penal Code, Sec. 32.41, which provides that, "An offense under this section is a Class C misdemeanor." The element of fraud is not an element under Sec. 32.41, supra, and appellant argues that before he could be punished under V.T.C.A. Penal Code, Sec. 31.03(d) (4), providing that where property stolen is $200.00 or more but less that $10,000.00 the offense is a felony of the third degree, that an essential element of the offense is that the recipient of the check is defrauded rather than the drawee of the check made same with the intent to defraud under 567b, supra. Appellant's position appears to be bottomed on the proposition that

under V.T.C.A. Penal Code, Sec. 31.06,[2] "Presumption for Theft by Check," it is necessary to aver and prove pursuant to such statute "the actor obtained property or secured performance of service by issuing or passing a check..."[3] Since no such allegation appears in the instant indictment, it is argued that had election to be punished under the new code been made by appellant's counsel, punishment could only have been assessed for a violation of Sec. 32.41, supra, "Issuance of Bad Check," and punishment would have fallen within the Class C misdemeanor range.

---

2. Sec. 31.06, supra, provides in pertinent part:

"(a) If the actor obtained property or secured performance of service by issuing or passing a check or similar sight order for the payment of money, when the issuer did not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders then outstanding, his intent to deprive the owner of property under Section 31.03 of this code (Theft) or to avoid payment for service under Section 31.04 of this code (Theft of Service) is presumed (except in the case of a postdated check or order) if:

In Wright v. State, 527 S.W.2d 859, we held:

"It was clearly not the intent of the Legislature by virtue of the 'Savings Provision' to give the defendant in a criminal case the right, in some cases, to wait until the penalty stage of a bifurcated trial and then cast additional problems of pleadings upon the State by his election to be punished under the new Penal Code. In other words, a defendant indicted for an old Code offense cannot wait until his trial after the effective date of the new Code and then file his written election to be punished under the new Code and claim that certain otherwise applicable penalty provisions of the new Code are inapplicable as punishment because the indictment properly drafted under the old Code did not also contain certain alledgations now required under the new Code."

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note 2. cont'd.

(1) he had no account with the bank or other drawee at the time he issued the check or order; or
(2) payment was refused by the bank or other drawee for lack of funds or insufficient funds, on presentation within 30 days after issue, and the issuer failed to pay the holder in full within 10 days after receiving notice of that refusal."

3. See New Texas Penal Code Forms, Sec. 31.06A, "Theft by Check - of Property" (W. Morrison & T. Blackwell).

In Bishoff v. State, 531 S.W.2d 346, it was stated:

> "If several sections of the new Penal Code cover the type of offense or 'conduct' under the old Penal Code for which defendant is convicted, then the applicable section of the new Code must be determined from the proof if written election to be punished has been made by the defendant. Wright v. State, 527 S.W.2d 859; Ambers v. State, 527 S.W. 2d 855;...
>
> "...his election for punishment under the new Penal Co-e only made it necessary for the trial judge to determine from the proof which of the applicable sections of the new Code to apply."

Thus, had such an election been made, the failure of the indictment to aver that "...the actor obtained property or secured performance of service by issuing or passing a check.." did not preclude assessment of punishment under Sec. 31.03 (d)(4), a felony of the third degree, which under V.T.C.A. Penal Code, Sec. 12.34 provides punishment upon conviction of "not more than 10 years or less than 2 years" and a possible fine "not to exceed $5,000."

We are unable to look at the proof

to determine "which of the applicable sections of the new Code would apply" since there is notranscription of the court reporter's notes of the trial of the primary offense in the record before us. There is a stipulation of the evidence which does not include the element of "obtaining property or securing services" in the pleadings, but we cannot presume that the stipulation was in evidence or the necessary proof was not offered, absent a transcription of the court reporter's notes. Further, even if such record were before us and it did not include such proof, we cannot presume that if the appellant had made an election after the State offered its proof on the plea of guilty that the trial judge would not have allowed the State to reopen and offer additional evidence.

Appellant's claim that he would have received punishment for a Class C misdemeanor had his counsel (on trial of the primary offense) made an

election that punishment be assessed under the new Code is far too tenuous for us to find counsel ineffective.

A review of the record reflects that the court's finding in its order revoking appellant's probation is supported by the evidence.

No abuse of discretion is shown in revoking appellant's probation.

The judgment is affirmed.

Per Curiam

(Delivered November 10, 1976)

APPENDIX D

"THE COURT: There being nothing further, the Court finds that the State has not proven the indictment in Cause F-75-12165, by the legal and competent evidence beyond a reasonable doubt, and finds the Defendant to be not guilty in that case.

Now, we will hear arguments in the probation revocation case.

MR. COLVIN: I will waive.

MR. WORTHY: I will waive argument.

MR. COLVIN: We will waive argument, Your Honor, the Court has heard the evidence.

THE COURT: The Court will take under consideration and advisement the facts and circumstances as they relate to the motion to revoke probation, and will notify counsel at such time as I am ready to make my finding of fact and conclusions of law."

APPENDIX E

"THE COURT: The Court will do its very best to review the evidence and the law and make my findings of fact and conclusions of law on this matter, and will simply recess the case until such time as I have made my investigation of the facts.

MR. COLVIN: Thank you, Your Honor.

(Whereupon, this concluded the proceedings on this day, and this case was reset for January 28, 1976.)

APPENDIX F

January 28, 1976

P R O C E E D I N G S

THE COURT: All right, this is Cause No. C-74-407-QP, The State of Texas versus Richard Russell. That is your true name, is it not?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Russell, a hearing was held on January 15, 1976, concerning the motion to revoke probation filed by the District Attorney in your case. You were present with your attorney Emmett Colvin. The motion was presented and you entered a plea of true. Evidence was presented and the State filed a motion to amend the motion to revoke probation, it was granted and both sides rested and closed your case, and the Court took your case under advisement.

The Court is ready to make findings of fact in your case except I have misplaced the pad on which I worked on, so if you will excuse me I will go get that.

(Whereupon, a brief

recess was taken, after which the proceedings were resumed as follows:)

THE COURT: The Court having taken this case under advisement is now ready to make its findings of fact within the record.

The Court finds, at the time the Defendant, Richard Russell, who is presently before the Court, is one and the same person who was duly and legally convicted in Cause C-74-407-QP on the 19th day of February, 1975, for the offense of obtaining goods with intent to defraud, by giving a wrongful check, over the value of 50 dollars, on a bank without sufficient funds as charged in the indictment in this case.

The Court further finds that the Defendant was assessed a 5 year prison sentence but the Court did probate this sentence and place the Defendant on probation for a period of 5 years subject to certain terms and conditions of probation, one of the terms and conditions of probation was condition A, which was commit no offense against the laws of this or any other state

or the United States.

The Court finds that the Defendant did, on or about the 27th day of September, 1975, in Van Zandt County, State of Texas, receive certain property, to-wit: A check in the amount of 250 dollars from a person by the name of Otis Dunlap. The Court further finds that the check, in the amount of 250 dollars was negotiable, and was converted to current money of the United States of America, and that the value of the check was in excess of 200 dollars and less than 10,000 dollars.

The Court further finds that the said check and money was appropriated by the Defendant, Richard Russell to his own use and benefit, and that the Defendant did exercise control over the said property.

The Court finds further that the Defendant obtained the said property by making false statements to the effect that he owned certain property on which the 250 dollars was received as down payment.

The Court finds that this was a

false statement, and that the Defendant knew it to be a false statement in that he did not own the said property and did not have the ability to transfer the ownership of the property to the complaining witness, Otis Dunlap.

The Court further finds that the witness, Otis Dunlap did rely upon the Defendant's false representation in turning the money over to the Defendant. The Court finds that the said Otis Dunlap did not benefit in any manner from the transaction and did not receive the said money or any part of it in return, and did not receive any consideration for the property alleged in the indictment, and in the motion to revoke probation.

The Court finds that as a matter of law, based upon the facts and circumstances that the Defendant did appropriate the funds, and property named in the motion to revoke probation and that he received it and converted it without the effective consent of said Otis Dunlap and that he did commit the offense of theft of

corporeal personal property, the value of at least 200 dollars and not more than 10,000 dollars as charged in the motion to revoke probation.

The Court finds that this offense occurred in Van Zandt County, Texas.

The Court further finds that the offense alleged in the motion to revoke probation occurred after February 19, 1975, and during the term of probation of this Defendant. The Court finds that the motion to revoke probation has been sustained and the motion to revoke probation is granted, and the Court does, at this time, revoke the probation of the Defendant, Richard J. Russell.

APPENDIX G

F-75-12165-MP TRUE BILL OF INDICTMENT

In the name and by the Authority of the State of Texas, the Grand Jurors, good and lawful men of the County of Dallas, duly elected, tried, impounded, sworn and charged to inquire of offenses committed within the body of Dallas County, upon their oaths do present in and to the 194th Judicial District ourt of Dallas County, at the July Term, A.D. 1975, that one Richard Russell, hereinafter styled Defendant, on or about the 27th day of September in the year of our Lord One Thousand Nine Hundred and Seventy-five in the County and State aforesaid, did unlawfully, knowingly, and intentionally appropriate property, to-wit: current monies of the United States of America of the value of at least $200. but less than $10,000. without the effective consent of Otis M. Dunlap, the owner of said property and with intent to deprive said owner of said property, contrary to the form of the Statute

and against the peace and dignity
of the State.

Henry Wade
District Attorney
Dallas County

APPENDIX H

LOCAL COURT RULES INVOLVED

Rules of the Court of Criminal Appeals:

Rule 9. Motions for rehearing and leave to file, written argument; setting case for resubmission.

Motions for rehearing may not be filed as a matter of right. Any party desiring a rehearing of any matter determined by the Court must, within fifteen days after the opinion is handed down, present to the Clerk a motion for rehearing, distinctly specifying the grounds relied on for a rehearing, accompanied with a motion for a leave to file, and such written argument in behalf of the motion as may be desired; and nine copies of all such papers shall be presented to the Clerk for distribution to the Judges and Commissioners of the Court. The party presenting the motion for leave to file shall certify that copies of the motion for leave to file, motion for a rehearing and argument, if any, have theretofore been delivered to the opposite party. The motion for leave to file shall be filed by the Clerk, and together with the motion for rehearing and written argument, if any, will be submitted for action

of the Court. The Court may request the opposite party to submit a reply, and in that event the Clerk will so advise such party. If the Court concludes for any reason that a reply should not be requested, it will act upon the motion without giving prior notice to the opposite party. If as many as two members of the Court are of the tentative opinion that the motion for a rehearing should be granted in whole or in part, the motion for leave to file will be granted, the motion for rehearing will be filed, and the case will be placed upon the docket and will be thereafter set for a resubmission to the Court. Otherwise, the motion for leave to file will be overruled, and the motion for rehearing will not be filed. If the motion for a leave to file is granted, the Clerk will give notice to all counsel of record of the filing of the motion for rehearing by mail, or give such other notice as may be ordered by the Court. Any motion for rehearing may be amended, with leave of the Court, any time before its final disposition. When a case is set for resubmission on motion for rehearing, the Clerk will give notice to all counsel of record notice of such setting. However, when a case is set for resubmission on motion for rehearing, oral argument will be allowed only upon invitation from the Court upon the grounds specified by the Court,and ordinarily anyone so invited to present oral argument

will be limited to fifteen minutes, with it being understood that the Court may, in its discretion, limit or extend the time for such oral argument.

Rule 10. Opinion on motion for rehearing, rehearing by losing party.

If the Court hands down an opinion in connection with the determination of a motion for rehearing, the losing party, within fifteen days after such opinion is handed down, may seek a further rehearing by availing himself of and following the rules and procedures set forth in Rule 9 above with respect to motions for rehearing; but further motions for leave to file and further motions for rehearing shall not be filed or considered in any other event.

APPENDIX I

Court of Criminal Appeals of Texas

CLERK'S OFFICE

Austin, Texas, May 25, 1977

Dear Sir:

This is to advise that the Court has today overruled without a written opinion the Appellant's Second Motion for Rehearing in Cause No. 53,201, RICHARD RUSSELL

vs.

State of Texas.

Sincerely yours,

[redacted]

THOMAS LOWE, Clerk

APPENDIX J

Vernon's Annotated Texas Statutes:

Article 6166v. Commutation for good conduct.

In order to encourage prison discipline, a distinction may be made in the treatment of prisoners so as to extend to all such as are orderly, industrious and obedient, comforts and privileges according to their deserts. The reward to be bestowed on prisoners for good conduct shall consist of such relaxation of strict prison rules and extension of social privileges as may be consistent with proper discipline, commutation of time for good conduct shall be granted by the manager, and the following deduction shall be made from the term or terms of sentences when no charge of misconduct has been sustained against a prisoner, viz.: two days per month off the second year of sentence; four days per month off of the third year of sentence; five days per month off of the fourth year of sentence; six days per month off of the

fifth year of sentence; seven days per month off of the sixth year of sentence; eight days per month off of the seventh year of sentence; nine days per month off of the eighth year of sentence; ten days per month off of the ninth year of sentence; fifteen days per month off of the tenth year, and all succeeding years of sentence.

Article 61841. Commutation for good conduct.

In order to encourage prison discipline, a distinction may be made in the treatment of prisoners so as to extend to all such as are orderly, industrious, and obedient, comforts and privileges according to their deserts. The reward to be bestowed on prisoners for good conduct shall consist of such relaxation of strict prison rules and extension of social privileges as may be consistent with proper discipline. Commutation of time for good conduct,

industry and obedience shall be granted by the General Manager and twenty (20) days per month deduction shall be made from the term or terms of sentences of all prisoners in Class I; provided, however, that for State-approved trusties thirty (30) days deduction per month shall be made from the term or terms of all sentences of such State-approved trusties, and ten (10) days per month deduction shall be made from the term or terms of sentences of all prisoners in Class II as hereinafter provided, when no charge of misconduct has been sustained against a prisoner.

Supreme Court, U. S.
FILED
OCT 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-116

* * *

RICHARD RUSSELL,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

* * *

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-116

* * *

RICHARD RUSSELL,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

* * *

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

* * *

This brief in opposition to the petition for certiorari in this cause is respectfully submitted on behalf of the Respondent, The State of Texas.

OPINION BELOW

This case was affirmed in an opinion by the Court of Criminal Appeals on Petitioner's first Motion for Rehearing, and its decision is reported at: *Russell v. State*, 511 SW2d 770. The Court did not file an opinion in connection with the overruling of Petitioner's second Motion for Rehearing.

QUESTION PRESENTED

Did the Court of Criminal Appeals err in holding that a verdict of not guilty is not a bar to a probation revocation in which the same offense is alleged in the Motion to Revoke?

STATEMENT OF THE CASE

Petitioner entered a plea of guilty to the offense of defrauding with a worthless check over the value of $50.00 on February 19, 1975. Punishment was assessed at five years probated. Petitioner was then indicted by a Dallas County Grand Jury for the offense of theft during its July, 1975 term in Cause No. F75-12165-MP and subsequently a Motion to Revoke Probation was filed on October 30, 1975. By agreement, the Motion to Revoke Probation was heard simultaneously with Cause No. F75-12165-MP because both were based upon the same transaction. Trial was before the court upon a plea of not guilty in Cause No. F75-12165-MP. The court found Petitioner not guilty in Cause No. F75-12165-MP, ostensibly because the State failed to prove the venue allegation in the indictment. The court then took the Motion to Revoke Probation under advisement and on January 28, 1976 found that Petitioner had violated a condition of his probation, to-wit: commit no offense against the laws of this or any other state or the United States. Punishment was reduced by the court to three years.

Appeal was taken from the order revoking probation. The Court of Criminal Appeals affirmed the decision of the trial court in a per curiam opinion delivered on November 10, 1976. Petitioner, then filed for Motion for Rehearing which was denied in an opinion, *Russell v. State*, 551 SW2d 770. Petitioner's second Motion for Rehearing was denied without opinion.

STATEMENT OF THE FACTS

Briefly, Otis Dunlap purchased certain real property in Van Zandt County, Texas on September 20, 1975 and gave Petitioner a check for $250.00 as partial down payment. In their discussions prior to the sale, Petitioner told Dunlap that he owned the property and

did not disclose the fact that there were any legal impediments on the property. D. W. Campbell, a realtor who brokered the property with Petitioner, had earlier informed Petitioner that he could not attempt to sell it without disclosing the fact that Petitioner was only in the process of purchasing it. Dunlap later learned that Petitioner did not own the property and attempted to recover his money.

ARGUMENT

I.

THE PRINCIPLES OF DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL DO NOT APPLY TO PROBATION REVOCATION PROCEEDINGS.

Petitioner contends that his probation was improperly revoked because he was found not guilty in a prior trial for the offense which was alleged in the Motion to Revoke Probation. He reasons that since his prior trial before the court for theft resulted in a verdict of not guilty, the principles of double jeopardy applied, and that offense could not be used as a basis for the revocation of his probation.

It has been repeatedly held by the Texas Court of Criminal Appeals that revocation of probation does not subject a defendant to being placed in jeopardy twice for the same crime. *Valdez v. State*, 508 SW2d 842; *Bass v. State*, 501 SW2d 643, certiorari denied 415 U.S. 977, 39 L.Ed.2d 873, 94 S.Ct. 1563; *Settles v. State*, 403 SW2d 417. This is so because the nature of the revocation proceeding is not a criminal trial. *Branch v. State*, 465 SW2d 160.

Probation is not a right but is granted as a matter of grace. When a defendant, subsequent to a finding of

guilt, is sentenced to a correctional institution, the imposition of this sentence may be suspended in the discretion of the fact-finder. The defendant is then granted freedom from incarceration as long as he abides by the conditions set forth by the jury or the trial judge. This period of grace can be terminated if in the discretion of the trial judge he finds that any of these conditions have not been met. Article 42.12, Vernon's Ann. Code of Crim. Proc.

Thus, when it is alleged that one of the conditions has been abrograted, the trial court may remove a defendant from that period of grace if he finds by only a preponderance of the evidence that one or more of these conditions were violated. *Scamarado v. State*, 517 SW2d 293. Indeed, probation may be revoked on the basis of conduct which falls short of criminal conduct. *Burns v. United States*, 287 U.S. 216, 77 L.Ed. 266, 53 S.Ct. 154.

Initially, since the question of proof in a probation revocation hearing is lower than that for the ordinary criminal prosecution, ipso facto, the provisions of the Double Jeopardy Clause do not apply. The verdict of not guilty in a criminal trial means that the allegations in the indictment were not proved beyond a reasonable doubt. A fact-finder could well have determined that a defendant had committed an offense by a preponderance of the evidence, but because they still entertained a reasonable doubt, they are legally bound to render a verdict of not guilty. Thus a verdict of not guilty beyond a reasonable doubt does not necessarily include a finding of not guilty by a preponderance of the evidence. Accordingly, the issue of whether Petitioner committed theft by a preponderance of the evidence was still viable at the close of his trial for theft and the

principle of collateral estoppel does not attend.[1]

Because the revocation hearing is not a "trial" and since it is a proceeding based on the underlying offense and not the offense to which jeopardy can be deemed to attach, the Double Jeopardy Clause is inapplicable. That clause dictates that no person shall be twice put in jeopardy *for the same offense.* In a probation revocation hearing, the basis for the potential loss of liberty is the offense for which a defendant was originally convicted and in which his sentence was suspended. If probation is revoked, the defendant must serve a term in the penitentiary not, as here, because it was found he

[1]It is worthy to note that in the instant case, a fair reading of the record indicates that the court never made a finding as to the criminal acts alleged in the indictment, but instead found that the State had not proved the venue allegation. The trial on the merits, i.e., the theft case, involved a legally intricate land fraud situation. Yet after both sides closed, the only argument put forth by defense counsel was that the State had failed to prove the venue allegation (S/F 85-88). Immediately, after hearing the State's argument on venue, the court declared:

> "There being nothing further, the Court finds that the State has not proven the indictment in Cause F-75-12165, by the legal and competent evidence beyond a reasonable doubt, and finds the Defendant to be not guilty in that case.
>
> Now, we will hear arguments in the probation revocation case.
>
> MR. COLVIN: I will waive.
>
> MR. WORTHY: I will waive argument.
>
> MR. COLVIN: We will waive argument, Your Honor, the Court has heard the evidence.
>
> THE COURT: The Court will take under consideration and advisement the facts and circumstances as they relate to the motion to revoke probation, and will notify counsel at such time as I am ready to make my findings of fact and conclusions of law.
>
> MR. COLVIN: The Court does not desire to rule today?
>
> THE COURT: I have not read all of the exhibits in their entirety and would not rule until I have had time." (S/F 88-89).

Further argument was then heard on the evidence. (S/F 89-91).

The above-quoted exchange, taken with the surrounding circumstances, yields an obvious conclusion. At the close of the testimony, the court felt that the State had not proven venue, and simply found Petitioner not guilty without having to decide whether the evidence showed an offense. This notion is further substantiated by the fact that the court did not rule in the motion to revoke because "he had not read all the exhibits." It would seem logical that if the court hadn't read the evidence when he made his ruling, the court's verdict would not have been based upon evidence as to the criminal acts, if he hadn't read the evidence when he made his ruling. Thus, there never was an adjudication on the operative facts of the case.

committed the offense of theft, but because he committed the offense of defrauding with a worthless check over the value of fifty dollars.

This distinction is evident in the case relied upon by Petitioner, *United States v. Jenkins*, 420 U.S. 358, 43 L.Ed.2d 250, 95 S.Ct. 1006. There, the respondent was indicted and charged with "knowingly refusing and failing to submit to induction into the armed forces of the United States."[2] After a bench trial, the District court "dismissed" the indictment and discharged the respondent. The Government sought to appeal.

[2]§12(a) of the Military Selective Service Act, 62 Stat 622, as amended 50 USC App. SS 462(a).

This Court held that a dismissal of the charge against the respondent precluded the Government from appealing the order of dismissal on the ground that any further adjudication of the case was barred by the Double Jeopardy Clause. This Court so ruled because were the Government to prevail in its appeal, the respondent, upon further adjudication, could then be found guilty of the *same* offense of which he had previously been found not guilty, and sentenced for that *same* offense.

In *Price v. Georgia*, 398 U.S. 823, 825, 26 L.Ed.2d 300, 303, 90 S.Ct. 1757, this Court stated:

> "The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the '*same offense*' for which he was initially tried."
> (Emphasis Added).

In the instant case, as in any probation revocation, the offense which jettisons deprivation of liberty is not that which was alleged in the motion to revoke, but is that offense for which petitioner was placed on probation. Respondent has no quarrel with the principle that the issue of whether Petitioner committed the offense of theft beyond a reasonable doubt is forever precluded in a subsequent proceeding which is a criminal trial for that same offense. However, where the subsequent proceeding is not a criminal trial, but is merely an evidentiary hearing to determine whether Petitioner has violated a condition of probation, and where the proof required in that proceeding does not rise to the level required in a criminal trial, a prior finding that Petitioner did not commit the offense of theft beyond a reasonable doubt does not prevent, by virtue of double jeopardy or collateral estoppel, a potential finding that

he committed that offense by a preponderance of the evidence.

CONCLUSION

A finding of not guilty in a criminal trial for an offense does not preclude its use as the basis for a motion to revoke probation.

WHEREFORE, Respondent prays that the writ of certiorari be denied.

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PROOF OF SERVICE

I, John Pierce Griffin, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Brief in Opposition to Petition for Certiorari has been served on Petitioner by placing same in the United States mail, certified, postage prepaid, addressed as follows: Thomas S. Goggan, III, Esq., 910 American Bank Tower, Austin, Texas 78701, and Oliver Heard, Esq. 1019 Tower Life Building, San Antonio, Texas 78795, on this the 11th day of October, 1977.

JOHN PIERCE GRIFFIN
Assistant Attorney General

Supreme Court, U. S.
FILED
NOV 7 1977
MICHAEL RODAK, JR., CLERK

NO. 77-116

IN THE

SUPREME COURT OF THE UNITED STATES

* * * *

RICHARD RUSSELL, Petitioner

VS.

THE STATE OF TEXAS, Respondent

* * * *

PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

* * * *

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PETITIONER'S RESPONSE TO
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PETITION FOR CERTIORARI

* * * *

TO THE HONORABLE SUPREME COURT OF
THE UNITED STATES:

Petitioner, Richard Russell, respectfully submits this his Response to the Brief in Opposition to Petition for Certiorari filed by the State of Texas herein and respectfully shows the Court as follows:

The issue which Petitioner submits to this Court for decision is clearly and sharply defined. Both Petitioner and the State agree that the question presented by this Record is whether or not it is Constitutionally permissable for a State Court to revoke probation in sole reliance upon a particular alleged criminal offense subsequent to a verdict of not guilty upon an indictment based upon the identical offense. (Petition for Writ of Certiorari p. 2, Brief in Opposition p. 1). Petitioner urges that the termination of a prosecution in favor of the accused is a bar to further proceedings under the principles of Double Jeopardy and collatoral estoppel within the contemplation of the Fifth Amendment to the Constitution.

It is the position of the State of Texas, as Petitioner understands it, that the Double Jeopardy provisions of the Fifth Amendment do not apply to probation revocation proceedings. (Brief in Opposition p. 3). In support of this proposition the State marshalls the familiar contentions that:

(1) "...the nature of the revocation proceeding is not a criminal trial."

(2) "Probation is not a right but is granted as a matter of grace."

(Brief in Opposition p. 3)

In reply to the first point, Petitioner shows that a revocation proceeding is a vital and integral part of the criminal justice process to which Federal Constitutional principles clearly apply. Mempa vs. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336. A State Court's characterization of a proceeding as "civil", "criminal", or even "quasi administrative" is not sufficient to avoid the thrust of the Constitution. Kent vs. United States, 383 U.S. 541, 16 L.Ed. 2d 84, 86 S.Ct. 1045; Re Gault, 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428; Smith vs. Bennett, 365 U.S. 708, 712, 6 L.Ed. 2d 39, 81 S.Ct. 895.

The decision of the Court of Criminal Appeals of Texas below is based upon the same attempted distinction between a criminal probation revocation proceeding and a criminal "prosecution." The Court states in Russell vs. State, 551 S.W.2d 710 at page 714 :

"...This is a revocation proceeding and as such is not a criminal prosecution."

"...Thus in criminal cases in which an individual has once been hailed before a jury or a judge and found innocent, res judicata, including collateral estoppel, rests upon the double jeopardy clause of the Fifth Amendment and prevents a second prosecution for the same conduct or subject matter. Obviously that is not the situation in a revocation proceeding. It is not a 'prosecution.'

The fallacy of this reasoning is perhaps best illuminated by another Opinion of the Court of Criminal Appeals of Texas in Campbell vs. State, 456 S.W.2d 219, wherein the Court, per Presiding Judge Onion, noted:

"Since the earlier decisions of this Court concerning the nature of the revocation proceedings, it has now been held that while the State is not constitutionally required to provide for probation and revocation proceedings as part of it's criminal process any more than it is required to provide for Appellate review, when it does then due process and equal protection of the law is fully applicable thereto. (Citing numerous authorities.) It would

> indeed now be difficult to conclude that probation revocation hearings are not criminal proceedings where substantial rights of an accused may be affected. (Citing Mempa vs. Rhay, supra). The revocation proceedings cannot be isolated from the context of the criminal process." (Emphasis supplied).

Thus it is clear that criminal probation revocation proceedings are criminal proceedings subject to federal constitutional safeguards is a principle recognized and enunciated by both the Court of Criminal Appeals of Texas and this Court.

The State next attempts to avoid the inevitable application of the Constitution to the proceeding at bar by contending that, "Probation is not a right but is granted as a matter of grace." (Brief in Opposition, p. 3). This Court has repeatedly rejected this position, recognizing that although the original order granting probation may have been a privilege, a favor, or an exercise of

of the chancellor's grace, it does not follow that constitutional rights do not surround it's revocation. Schware vs. Board of Law Examiners, 353 U.S. 232, 1 L.Ed. 2d 796, 77 S.Ct. 752; Slochower vs. Board of Education, 350 U.S. 551, 100 L.Ed. 692, 76 S.Ct. 637; Mempa vs. Rhay, supra.

The State next contends that since the burden of proof in a probation revocation hearing is different from that under an indictment--i.e. a preponderance of the evidence vs. beyond a reasonable doubt--"ipso facto" the provisions of the Double Jeopardy Clause do not apply to revocation proceedings (Brief in Opposition p. 4). The State argues:

> "A fact finder could well have determined that a defendant had committed an offense by a preponderance of the evidence, but because they still entertained a reasonable doubt, they are legally found to render a verdict of not guilty. Thus a verdict of not guilty does not necessarily include a finding of not guilty by a preponderance of the evidence."
>
> (Brief in Opposition p. 4)
> (Emphasis Supplied)

The fallacy in this reasoning and the constitutional mischief to which it leads is readily apparent. A fact finder returning a verdict of "not guilty" could just have well have determined that a defendant had not committed an offense by any standard of proof. Thus, a verdict of not guilty does not necessarily preclude a finding of not guilty by a preponderance of the evidence or any other formulation of degree of proof.

In our system of jurisprudence an accused citizen under indictment stands before the trier of fact, which is charged to find him guilty of the offense beyond a reasonable doubt or to find him not guilty. The State would have reviewing Courts speculate on that which "a fact finder could well have determined," and then to presume that the fact finder's determination is consistent with the guilt of the accused, rather than with his innocence. Thus the State would in effect transform the presumption of innocence into a presumption of guilt. Once again the fundamental

constitutional problem here is illuminated by a passage in the opinion of the Court of Criminal Appeals below. The Court states in Russell vs. State, 551 S.W.2d 710 at page 714 :

> "The Federal Constitution as well as the Texas Constitution prohibit placing an accused twice 'in jeopardy' for the same offense. Thus, in criminal cases in which an individual has once been hailed before a jury or a judge and found innocent, res judicata, including collateral estoppel, rests upon the double jeopardy clause of the Fifth Amendment and prevents a second prosecution for the same conduct or subject matter." (Emphasis supplied).

Clearly in our system we do not hail individuals before judges and juries and find them"innocent". We bring individuals presumed to be innocent before judges and juries and find them guilty or not guilty.

In the case at bar the Petitioner was indicted, tried, and found not guilty. The State would have this Court presume that the verdict of not guilty was consistent with the guilt of the accused, rather than with his innocence, the

presumption to which he is constitutionally entitled. The State would have this Court presume as a matter of law that the verdict of not guilty did not contain some element of a resolution of some factual controversy in favor of the accused. This leads directly to the holding of the Supreme Court in United States vs. Jenkins, (1975) 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed. 250, wherein such contention was squarely faced and unequivocally rejected.

The State contends that in the instant case the record indicates that the Court never made a finding as to the criminal acts alleged in the indictment, but instead found that the State had not proved the venue allegation. (Brief in Opposition p. 5, footnote 1). The actual record, the pertinent part of which is reproduced on the same page of the State's brief is not limited or equivocal as the State contends. The Court simply states:

> "There being nothing further, the Court finds that the State has not proven the indictment in Cause No. F-75-12165 by the legal and competent evidence

> beyond a reasonable doubt, and finds the Defendant to be not guilty in that case."

The State then notes that this case involved an intricate land fraud situation, but would have this Court presume that the Trial Court did not resolve some factual element of an admittedly complex case in favor of the accused. Finally, the State would avoid the manifest operation of the Double Jeopardy Clause by contending that Petitioner is not imprisoned for the offense of which he was found not guilty, but for the underlying offense for which he was placed on probation. The State argues, "In the instant case ... the offense which jettisons deprivation of liberty is not that which was alleged in the motion to revoke . . ." (Brief in Opposition p. 7). Petitioner respectfully submits that this reasoning is at best an artful sophistry. The real fact of the matter is that prior to being charged with theft in the motion to revoke and contemporaneous indictment

the Petitioner was at liberty. As a direct and proximate result of the revocation proceeding Petitioner is now imprisoned in the Texas Department of Corrections. There can be no question but that the immediate cause of Petitioner's incarceration was the Trial Court's finding that he had committed the offense of theft, of which he had previously been acquitted.

Petitioner realizes that probation may be revoked for conduct that is less than criminal, but when the State relies solely upon the commission of a criminal offense as a basis for revocation it may not rely upon an offense of which the accused has been acquitted.

CONCLUSION

Federal Constitution prohibitions clearly apply to State criminal revocation proceedings. Thus, a verdict of not guilty is a bar to a probation revocation based upon the same.

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By Thomas Goggan
Thomas Goggan

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Response to Brief in Opposition to Petition for Certiorari has been forwarded to John Pierce Griffin, Assistant Attorney General, P. O. Box 12548, Austin, Texas 78711 and Henry Wade, Criminal District Attorney, Dallas County Courthouse, Dallas, Texas as attorneys for the Respondent on this 5 day of November, 1977 by certified United States mail, postage prepaid.

Delmar L. Cain